IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA518/2018
[2019] NZCA 314

BETWEEN	GRANT ROBERT LLOYD AND PHILIP JAMES LESLIE NEVILL Appellants
AND	PANGANI PROPERTIES LIMITED Respondent

Hearing: 4 June 2019

Court: Courtney, Stevens and Wild JJ

Counsel: R J B Fowler QC and A B Darroch for Appellants
J V Ormsby and S S R Meares for Respondent

Judgment: 16 July 2019 at 4 pm

JUDGMENT OF THE COURT

A The appeal is allowed to the extent that the High Court's award of $100,000 in damages for costs incurred by the respondent in the disciplinary proceeding before the Complaints Assessment Committee is reduced to $38,260.

B The appeal is otherwise dismissed.

C The appellants must pay the respondent costs for a standard appeal on a band A basis, but reduced by 25%, and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Wild J)

Introduction

[1] This appeal from a judgment of Ellis J given in the High Court at Palmerston North on 6 August 2018 concerns a breach of fiduciary duty by the appellant real estate agents.[1] They admit the breach, though perhaps not its seriousness. There is agreement as to the relevant legal principles.

[2] At the outset of argument, Mr Fowler QC for the appellants abandoned the first ground of appeal: that the Judge erred in holding the "narrow escape route" was not available to the appellants. In other words, Mr Fowler abandoned any argument that the breach was inconsequential.

[3] The questions on appeal were thus limited to identifying the correct measure of damages and quantum.

Facts

Malden Street — sell, or develop for the tenant?

[4] The respondent (Pangani) developed and owned commercial properties. Mr Olsen was the managing director and the driving force behind the company. One of Pangani's properties was a warehouse in Malden Street, Palmerston North (the Malden Street property). It was leased to Steel and Tube Ltd (Steel). Steel needed more space and told Mr Olsen it was considering shifting when its lease expired in November 2013. In August 2010 Mr Olsen unsuccessfully attempted to accommodate Steel's need by purchasing additional land from the adjoining owner, Mr Jones. Mr Jones was willing to sell, but not at the price offered. Mr Olsen then put the Malden Street property on the market, listing it with The Professionals (not the appellants) in November 2010 at an asking price of $4 million. It did not sell.

[5] Two years later, in late 2012, Steel reiterated to Mr Olsen its need for more space and its intention to move when its lease expired. Discussion ensued about the possibility of Pangani purchasing additional land from Mr Jones. When Mr Olsen explained that Mr Jones was seeking an unrealistic price, Steel told him not to pursue

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1 *Pangani Properties Ltd v Lloyd* [2018] NZHC 1982.

the matter. Nevertheless, Mr Olsen kept open the possibility of buying more land from Mr Jones so that Pangani could retain Steel as a tenant. Mr Olsen commissioned an architect to design a new building for Steel on Mr Jones' adjoining property. He discussed this plan with one of his fellow Pangani directors, Mr Riechelmann, in July 2013. But Steel continued to look at other sites to which it might relocate and Mr Olsen continued to consider selling the Malden Street property.

Approach by the appellant agents

[6] On 8 July 2013 Mr Olsen was approached by one of the appellants, Mr Lloyd. He said he had an overseas company interested in either leasing or purchasing the Malden Street property. Mr Olsen indicated he "was rather keen to sell", and to that end obtained a valuation from Blackmore Group. This valued the property at $3.2 million.

[7] The appellants, whose firm was part of the Colliers organisation, then presented a marketing proposal to Pangani. This proposal recommended a sale or lease by negotiation. It appraised the market net rental of the property at $367,000 plus GST (Steel's current rental was $350,000) and the market sale value as in the range of $3–4 million, realistically around the middle of that bracket. Mr Olsen's son-in-law, Mr Paul Hain,[2] emailed Mr Lloyd seeking further information including the:

> Suggested method of marketing the property … Bearing in mind that the intention is to either lease or sell the building.

And the :

> Target market in regard to both tenants/purchasers.

Agency to sell/lease

[8] On 7 August 2013 Pangani granted the appellants a sole agency "to sell/lease" the Malden Street property. Discussions between the parties and negotiations with Mr Jones continued through August, September and October 2013. During this period

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[2] Mr Hain was also a real estate agent, with Bayleys in Auckland.

the appellants sent Pangani four successive marketing reports. These identified the company Domett Fruehauf Ltd (Fruehauf) as the best prospect but stressed that Fruehauf needed a larger site for its operations. The fourth report, on 18 October 2013, outlined difficulties in negotiating with Mr Jones.

Sale to Zambora

[9] On 22 October 2013 Zambora Projects Ltd (Zambora) offered to purchase the Malden Street property for $2.4 million.[3] Zambora was owned by Mr Doyle who knew Mr Lloyd: the two met occasionally for coffee. When presenting the offer, Mr Lloyd explained that Fruehauf was still interested, but would not be in a position to make an offer for "4 to 6 weeks (if at all)". Mr Lloyd pointed out that Zambora did not need additional land which he said "is proving problematic and part of the issues with [Fruehauf]".

[10] After discussing Zambora's offer with Mr Nevill, Mr Olsen made a counter-offer of $2.65 million which Mr Doyle accepted on 24 October 2013. The agreement was conditional on Zambora completing due diligence within 20 working days. The due diligence period expired at 5 pm on Friday 22 November 2013.

NZ Post

[11] Back in September 2013 Mr Nevill had discussed with Mr Morris, the National Property Manager for Operations at New Zealand Post Ltd (NZ Post), the possibility of NZ Post locating a Kiwibank contact centre in Palmerston North. By November NZ Post was seeking a property in Palmerston North suitable for a large mail processing facility. Following a change of approach, Mr Morris began looking for sites in Palmerston North for a smaller, stand-alone, mail processing centre. Mr Morris had himself, by internet search, identified the Malden Street property as a possibility. On 21 November Mr Morris arranged with Mr Nevill to inspect the Malden Street property on 25 November.

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[3] It appears that Zambora changed its name to Malden Street Holdings Ltd. For simplicity, we refer to Zambora.

[12] In the meantime, the appellants had told Mr Olsen that Zambora wanted an extension of time to complete due diligence. Such an extension was formally requested by Zambora's lawyer on 21 November 2013.

[13] There is no need to detail the events that followed because the evidence establishes the following critical facts:

- Not until 26 November did Pangani grant Zambora an extension of time to complete due diligence.

- Prior to that extension the appellants had several opportunities to tell Mr Olsen of NZ Post's interest in the Malden Street property but did not do so. For examples, on the morning of 25 November, before the appellants inspected the property with Mr Morris, Mr Lloyd spoke to Mr Olsen by phone for nearly five minutes. Later that day, following the inspection, Mr Lloyd rang Mr Olsen and spoke for a little over 10 minutes. On neither occasion did Mr Lloyd mention NZ Post's interest. Given the next fact we list, NZ Post's strong interest in the Malden Street property must have become apparent to the appellants during their inspection of the property with Mr Morris on 25 November, which took place between those two phone calls.

- The following day, 26 November, Mr Morris emailed Mr Nevill informing him that he had just met with architects and engineers to brief them about the Malden Street property and commission them to work out a concept showing how NZ Post's proposed mail processing facility might fit onto the site.

- On 29 November the appellants met with Mr Doyle and informed him of NZ Post's interest in the Malden Street property. At Mr Doyle's request, the appellants arranged for Mr Doyle to meet Mr Morris.

- On 11 December the appellants, Mr Doyle, Mr Morris and other NZ Post representatives together made a detailed inspection of the Malden Street property.

- Later that same day, 11 December, Mr Doyle confirmed the due diligence condition was satisfied and Zambora's purchase from Pangani became unconditional.

[14] After settling the purchase, Zambora developed the Malden Street property to NZ Post's specifications and leased it to NZ Post for an initial term of eight years commencing upon the practical completion of the development work. Zambora sold the developed, leased property to Mainland Capital Ltd (Mainland) on 12 December 2014 for $7.65 million.

[15] Given their agency was to sell or lease, the appellant agents had a duty to tell Pangani of NZ Post's interest in leasing its Malden Street property when they became aware of it. That was by 25 November at the latest, probably earlier. They did not and, as we have recorded, now accept this failure was a breach of their fiduciary duty to Pangani. Their breach was deliberate and serious, doubtless prompted by a desire not to lose the $63,150 commission they earned on Pangani's sale to Zambora, and potential further commissions. The Judge noted that the appellants received four successive commissions totalling $331,628: on the sale by Pangani to Zambora; on the sale by Mr Jones to Zambora; on the lease by Zambora to NZ Post; on the sale of the leased property by Zambora to Mainland.[4]

Issue 1: did the Judge apply the correct measure of damages?

[16] The Judge held the appropriate measure of damages was the value to Pangani of the opportunity it lost not to sell its property to Zambora but to retain, enlarge and develop it, and then lease it long term to NZ Post.[5] She assessed the value of this lost opportunity at $650,000.[6]

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4 *Pangani Properties Ltd v Lloyd*, above n 1, at [108]. We note that Mr Nevill, in evidence, itemised four commissions totalling $357,158.

5 At [117], [128] and [132].

6 At [148].

[17] Relying on the Supreme Court's decision in *Premium Real Estate Ltd v Stevens*, Mr Fowler argued the correct measure of damages was any undervalue in Pangani's sale to Zambora.[7] Mr Fowler sought to persuade us that *Premium* is indistinguishable from this case and, as the valuation evidence indicated the sale of the Malden Street property was at full value, there was no loss to Pangani. Thus, the Judge ought only to have required the appellants to disgorge the commissions they earned subsequent to the sale to Zambora. These totalled $276,000.

[18] We do not agree that the present case is factually the same as *Premium*. In *Premium* the real estate agent had, before the sale agreement, deliberately failed to disclose to her principals information about the modus operandi of the prospective purchaser relevant to the price at which the principals would have been prepared to sell. As Mr Fowler accepted, the appellants' breach occurred after Pangani had agreed (conditionally) to sell to Zambora. But, more significantly, it occurred in the context of Pangani looking to either sell or lease the Malden Street property.

[19] The Judge distinguished *Premium* because it involved a breach of fiduciary duty affecting the sale price, whereas "the actuating and serious breach [in this case] occurred *after* the price had been agreed but at a time when [Pangani] had (but did not know it had) an opportunity to cancel the contract and effectively start again with a materially different deal with a different potential counter-party".[8] Mr Fowler contended the timing difference was inconsequential because Pangani's claim was that it would not have sold, but for the appellants' breach. In other words, it was the existence of the contract and the commitment to sell that resulted from the breach.

[20] We do not accept this argument. In *Premium* the plaintiffs wanted to sell their property and the issue was simply whether they had received market value for it notwithstanding their agent's breach of duty. In this case Pangani had made it clear it was open to either selling or leasing. The appellants' breach of fiduciary duty deprived Pangani of a viable opportunity to lease. The Judge was right to reject the difference in market value on sale as the correct measure in favour of loss of opportunity.

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7 *Premium Real Estate Ltd v Stevens* [2009] NZSC 15, [2009] 2 NZLR 384 at [85] per Blanchard, McGrath and Gault JJ.

8 *Pangani Properties Ltd v Lloyd*, above n 1, at [128].

[21] When a breach of fiduciary duty is established, the full benefit of hindsight is available to assist in calculating resulting losses.[9] Here, that hindsight included the profits actually achieved by Zambora which had, and realised, the opportunity denied to Pangani by the appellants' breach. Had Pangani been able to retain, develop and lease to NZ Post its Malden Street property, it may then have sold it, as Zambora did. But, with a long-term blue-chip tenant, it may have chosen to retain the property in its portfolio. Either way Pangani's gain would be substantially the same, but unrealised had it retained the property.[10]

[22] We do not accept Mr Fowler's argument that any undervalue on the sale to Zambora (alternatively, the disgorgement of commissions) was the appropriate measure of Pangani's damages. The nub of Pangani's case was that the appellants' breach caused it to lose the opportunity *not* to sell to Zambora, but to develop the property and lease it to NZ Post just as Zambora did. Having accepted this, the Judge was correct to measure Pangani's damages by assessing the value of that lost opportunity.

Issue 2: errors in the Judge's loss calculation of $812,500?

[23] Pangani advanced its case for damages for loss of opportunity on the basis of expert accounting evidence from Mr Hempleman. Mr Hempleman assumed Pangani would have done what Zambora did: develop the property, lease it to NZ Post and then sell the leased property to Mainland in December 2014. The sale price to Mainland was $7,650,000. From that sale price Mr Hempleman deducted purchase and development costs totalling $6,761,590 to arrive at a profit of $888,410 (which he rounded down to $885,000). In recognition of the variables affecting the development costs, Mr Hempleman considered a range was a more appropriate way of stating the profit Pangani would have made, and advanced $789,000 to $1,045,000.

[24] Pangani claimed lost profits of $799,000. As the Judge noted, this was a "straightforward reflection of the lower end of Mr Hempleman's range".[11] The Judge

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9 *Premium Real Estate Ltd v Stevens*, above n 7, at [35]–[36] per Elias CJ.

10 We say "substantially" because Pangani's profit would have been higher had it retained the property. We explain this in [33] below.

11 *Pangani Properties Ltd v Lloyd*, above n 1, at [144].

also noted the appellants had not called evidence to contradict that of Mr Hempleman. That was consistent with the appellants' position that the appropriate measure of damages was any undervalue on Pangani's sale to Zambora.[12]

[25] Mr Fowler submitted four errors marred the Judge's award of $650,000. In considering these it is perhaps best to take the Judge's award as $812,500 because she assessed, at 80 per cent, the probability of Pangani achieving the profit calculated by Mr Hempleman ($650,000 is 80 per cent of $812,500).[13]

[26] First, had Pangani retained the Malden Street property, Mr Fowler pointed out that it would not have had the use of the $2.6 million proceeds from its sale to Zambora from 21 February 2014 through to mid-May 2015. Allowing five per cent for the use of that money over that 14-month period yields $91,000.

[27] This point appears not to have been put to the Judge; at least there is no mention of it in the judgment. Ms Meares, who responded to this part of the appellants' argument, did not squarely address the point. We are not persuaded it has substance. The starting point of Mr Hempleman's loss calculation was a cost to Pangani of $2,586,850 for the Malden Street property. This was the price at which Pangani sold the property to Zambora, net of sales commission. As Pangani already owned the property, this was a notional cost: it was not actually incurred by Pangani. If a deduction is made for the use of the $2.6 million sale proceeds, that will hit Pangani twice.

[28] Even were that not the case, we do not consider the absence of a "use of money" allowance mars the Judge's loss calculation. Her starting point of $812,500 was a conservative one. It is over $230,000 below the $1,045,000 which was the top of Mr Hempleman's profit range, some $100,000 below the $917,000 mid-point of his profit range, and about $75,000 below his profit calculation of $888,410. The lack of an allowance for "use of money" was not put to Mr Hempleman in cross-examination. We consider the Judge's award comfortably accommodates Pangani's use of the proceeds of its sale to Zambora.

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12 At [145].
13 At [137].

[29] Secondly, Mr Fowler submitted the Judge erred in effectively awarding Pangani the $63,150 commission on its sale to Zambora twice. Once by ordering the appellants to disgorge that commission, an order the appellants do not challenge. Then a second time as part of her award of $650,000 for lost profits. We accept this occurred. The notional purchase cost to Pangani of $2,586,850 for the Malden Street property nets out the $63,150 sales commission. Mr Hempleman makes this clear in his evidence. But that is in accordance with principle affirmed by all the Judges in *Premium*. Tipping J explained it in this way:[14]

> [97] … I do, however, wish to add some further reasons why Premium should be required to refund the commission as well as compensate the Stevens for their loss. On one view, this has an appearance of double-counting because the damages representing the loss are calculated net of commission.
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> …
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> [110] It is just such a case as this that demonstrates the desirability of the courts being able to award both compensatory and restorative damages. Premium should be required to compensate for the Stevens' loss and pay back the commission which it did not earn. There is no basis upon which Premium should, as a matter of discretion, be allowed to keep all or part of the commission. There is a need to deter those in Premium's shoes from breaching their fiduciary duties in this deliberate way. To the extent that requiring the refund of the commission as well as paying compensation for the loss caused may be seen as having a punitive effect, it is appropriate that this be so. …

[30] Thirdly, Mr Fowler submitted the Judge erred in omitting any project management costs when calculating Pangani's lost profits. Any such allowance was omitted by Mr Hempleman, based on Mr Olsen's evidence that he would have managed the development himself. Under cross-examination, Mr Hempleman accepted that Pangani would have incurred some development expenses, at least in the form of travel and accommodation expenses for Mr Olsen who lived in Auckland. Mr Hempleman also accepted he had no knowledge of what a professional project manager would charge. But, assuming it was eight per cent of the project value of $5.8 million (the figures put to him in cross-examination), Mr Hempleman accepted the resulting project management cost of $450,000 would reduce the profit on the development to around $400,000. Mr Olsen was also cross-examined at length about

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[14] *Premium Real Estate Ltd v Stevens*, above n 7. See also Elias CJ at [31] and [53] and Blanchard, McGrath and Gault JJ at [90].

his assertion that he could and would have managed the development of the Malden Street property himself.

[31] Having heard all this evidence, the Judge concluded:[15]

> The principal inroad made into his calculations during cross-examination related to the site management cost. Although Mr Olsen had given evidence that he would have performed that task himself (which was one of the reasons for removing this item from the calculations) his doing so would plainly come at some cost, account of which should properly be taken.

The Judge then stated that she intended fixing the amount of equitable compensation in "a broad brush way".[16] She specifically stated that one of the matters she took into account was the limitations of the material on which Mr Hempleman based his conclusions and "the small adjustment" she considered was required.[17] Although the Judge did not identify or quantify that adjustment, she was clearly referring to an allowance for site management costs. If the Judge's award net of the 20 per cent probability is taken as $812,500,[18] and is set against Mr Hempleman's calculation of $888,410,[19] then the Judge allowed some $75,000 principally for site management costs.

[32] Fourthly, Mr Fowler contended there was "muddlement" in the way Mr Hempleman had dealt with the commission on the sale of the Malden Street property developed and leased to NZ Post. Zambora sold the property to Mainland in December 2014 for $7.65 million. It paid the appellants a commission on that sale of $165,000 inclusive of GST. In arriving at the profit calculation of $888,410 referred to in [23] above, Mr Hempleman deducted that commission. "Selling costs" of $165,000 are one of the development expenses listed in his calculation. What Mr Hempleman said when concluding his evidence-in-chief was:

> 60 Further to this, my calculation is based upon the assumption that, like Mr Doyle, Pangani would have sold the property at 39 Malden Street, Palmerston North to [Mainland] on 12 December 2014. I note that had Pangani completed the development and decided to retain the

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15 *Pangani Properties Ltd v Lloyd*, above n 1, at [145].
16 At [146].
17 At [146(b)].
18 As explained at [25] above.
19 At [23] above.

> property in its portfolio of property investments, it would have saved $165,000 selling costs, thereby increasing its notional profit on the development to $1,047,318 (say $1,045,000).

[33] When questioned about this, Mr Hempleman accepted his profit calculation was based on Pangani selling the Malden Street property, just as Zambora had done. But the notional or unrealised profit of $1,047,318 (which Mr Hempleman rounded down to $1,045,000) which represented the top of his profit bracket could only have been achieved had Pangani retained the property in its portfolio. It is perhaps a little harsh to categorise this as "muddlement": Mr Hempleman explained clearly that Pangani could only achieve the $1,045,000 profit by retaining the Malden Street property.

[34] For the reasons we have explained we reject Mr Fowler's submission that the four claimed errors marred the Judge's loss assessment of $812,500.

Issue 3: was the Judge's assessment that Pangani had an 80 per cent chance of realising the lost opportunity too high?

[35] Mr Fowler did not challenge the Judge's view that loss of chance compensation was available for breach of a fiduciary obligation. Nor did he contest the way Mr Ormsby summarised the approach in assessing the value of a lost opportunity. Applied here:

(a) Uncertainties as to how Pangani would have acted but for the appellants' breach are to be decided on the balance of probabilities.

(b) Uncertainties as to the actions of others, for example Mr Jones and NZ Post, are to be determined on loss of chance principles.

[36] This Court in *Benton v Miller & Poulgrain (a firm)* explained loss of chance principles thus:[20]

> [50] In making a "loss of chance" assessment, broad judgments are called for. At one end of the spectrum, very low probabilities are unlikely to be reflected in an award of damages. So if the chance of avoiding an adverse event is as low as say one in ten, a Court will probably reject the claim rather

[20] *Benton v Miller & Poulgrain (a firm)* [2005] 1 NZLR 66 (CA).

> than fix damages at ten per cent of the cost to the plaintiff associated with those adverse events. At the other end of the spectrum that approach is sometimes, but not always, adopted. So a 90 per cent chance of avoiding an adverse event may result either in complete recovery of all losses associated with that adverse event (on the theory that the chance of not avoiding those losses was sufficiently speculative to be able to be ignored) or alternatively a discount of ten per cent for contingencies.

[37] Mr Fowler fastened primarily on the Judge's acceptance "that Mr Doyle managed to secure the lease [to NZ Post] only by the skin of his teeth".[21] Mr Fowler also took us through the evidence given by Mr Morris of NZ Post and some of the documentary material he produced. This showed that NZ Post was actively considering both Malden Street and a site at Palmerston North airport. Indeed, in the earlier stages, there was a third option. A review by NZ Post on 29 January 2014 records the two options were "approximately cost neutral" and recommends pursuing both.

[38] When the Court pressed Mr Fowler for his figure he said 60 per cent, but added that he could not quibble with 66 per cent. He reiterated that what ought to have taken the Judge down to 60–66 per cent was the "skin of the teeth" situation, and the fact that the airport option "had its nose in front" (Mr Fowler's words). Though not without some initial hesitation during the argument, we have concluded the Judge's 80 per cent figure was fair and should be upheld. Five considerations have led us to that conclusion.

[39] First, the Judge took into account several "potential stumbling blocks" she considered would have stood in the way of Pangani successfully developing the Malden Street property and leasing it to NZ Post. These included securing deals with Mr Jones and Mr Morris, both of whom the Judge considered "would have played hard ball".[22] Mr Fowler did not suggest the Judge overlooked any of the difficulties that would have faced Pangani. We repeat that the Judge expressly noted "[t]he evidence was clear that Mr Doyle managed to secure the lease only by the skin of his teeth."[23]

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21 *Pangani Properties Ltd v Lloyd*, above n 1, at [135].
22 At [135].
23 At [135].

[40] Second, Mr Ormsby took us to the evidence outlining Pangani's past property developments and to the financial statements showing its position at the time. We consider the Judge was entitled to be satisfied that Pangani had the necessary capacity to develop the Malden Street property and to pursue a lease to NZ Post, both financially and in terms of its property development experience. In particular, the Judge saw and heard Mr Olsen as a witness and was well placed to assess his willingness and ability to manage the development. She factored in a concern "that Mr Olsen's age and his residence in Auckland might have presented difficulties [in his managing the project] particularly in light of the tight deadlines".[24] Pangani's property development experience and financial position both compared very favourably with those of Zambora.

[41] Third, Mr Jones and NZ Post would have been as willing to deal with Pangani as they were with Zambora. Again, the Judge expressed herself as satisfied on this critical point.[25]

[42] Fourth, the appellant agents saw the opportunity for Zambora to acquire the Malden Street property and the required additional land from Mr Jones, to develop the combined site and then lease it to NZ Post. They actively pursued all these aspects. For example, Mr Jones gave evidence that he did not have any dealings directly with Mr Doyle until the formal contract stage. It was the appellant agents who put together Zambora's deal to purchase Mr Jones' land. Similarly, Mr Morris said all his dealings with the proposals and formation of the key terms of the lease were with the appellant agents. Mr Doyle agreed. It could be expected that the appellants would have been equally proactive and effective for Pangani, had they fulfilled their agency obligations to it.

[43] Fifth, and relevant to the Judge's comment that Mr Doyle only managed to secure the lease to NZ Post "by the skin of his teeth", the documentation put in evidence by Mr Morris shows that by mid-December 2013, NZ Post's airport option no longer had "its nose in front". An internal email Mr Morris sent on 19 December 2013 states:

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[24] At [136].
[25] At [134].

> Given this a new build at the airport is now currently looking like a non-starter as we would need to land on a rental of around $960k per annum for it to be cost neutral between options …

[44] At that stage the airport was seeking a rental of $1.1 million and a lease term of 15 years. The shorter 10-year lease Zambora was offering (which NZ Post negotiated down to eight years) was also more attractive to NZ Post.

[45] Against these considerations, particularly NZ Post's keenness to secure a lease of the developed site, Mr Ormsby submitted the chance of Pangani realising the lost opportunity was almost a certainty. Whilst this might overstate the position, we consider the Judge's 80 per cent assessment is unassailable.

Issue 4: were the costs Pangani incurred in complaining to the Real Estate Agents Authority recoverable in the proceeding Pangani subsequently brought against the appellants in the High Court?

[46] After becoming suspicious as to what may have occurred, Pangani retained a private investigator. Armed with the investigator's report Pangani complained in October 2014 to the Real Estate Agents Authority. One of the grounds of complaint was that the appellants had not disclosed NZ Post's interest in the Malden Street property when they became aware of it, before Pangani extended the due diligence condition in its contract with Zambora. Subsequently, in December 2015, Pangani retained Mr Broom to report on its resulting losses.

[47] In a decision given on 28 April 2016 the Complaints Assessment Committee (the Committee) found the appellants had engaged in unsatisfactory conduct under s 89(2)(b) of the Real Estate Agents Act 2008 (the REAA). In particular, the Committee concluded the appellants had failed to disclose NZ Post's interest, breaching their fiduciary obligation to Pangani. The Committee sought submissions from Pangani and the appellants as to what orders it should make.

[48] Pangani made its submissions to the Committee in a letter dated 20 May 2016. Dealing with costs, Pangani pointed out that s 93(1) of the REAA gave the Committee jurisdiction to order the appellants to pay Pangani any costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee. Pangani asked for

an order that the appellants contribute toward its costs totalling $136,163.19 GST inclusive. It attached a schedule breaking these down:

- legal costs of $97,902.01;
- private investigator costs of $12,210.79; and
- accounting costs of $26,050.39.

Mr Fowler did not take issue with the Judge's allowance of the private investigator and accounting expenses, so these stand. Expanding on its request to the Committee for costs, Pangani said this:

> 3.7 Pangani accepts that costs orders are discretionary, and that given the extent of the costs incurred here, that [the Committee] may consider that these exceed its jurisdiction. However, Pangani submits given the exceptional circumstances, along with the complexity of the complaint and amount involved, that substantive recognition of the costs that Pangani has incurred should be made.

[49] The appellants' responding submission to the Committee is dated 7 June 2016. It noted Pangani's expressed determination to pursue a considerable civil claim against them. Given that, and the remaining dispute about what had occurred and the legal consequences, the appellants submitted Pangani's claim for a refund of commission and for a contribution to its costs should be left to the High Court. This is what it said:

> 23. A similar approach is suggested with the costs incurred by Pangani. The vast majority of these costs relate to Pangani's potential claim for compensation. The scale of the costs incurred and claimed are also well beyond the usual context of a disciplinary complaint. These costs can and will be addressed as Pangani's civil claim is resolved.
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> …
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> 26. No orders for the refund of the commission and costs are needed. …

[50] The Committee's further decision headed "Decision on Orders" was given on 12 August 2016. It notes Pangani's request for a contribution to its costs totalling $136,163.19 GST inclusive. The decision summarises the appellants' response in this way:

> 1.18. … Further, … it is apparent the Complainants will seek not only a refund of the commission paid to the Licensees, but also other commissions and compensation, which fall outside this property sale and that these are matters best left to be resolved through other mechanisms.

The Committee then made orders censuring and fining the appellants. It did not make an order for costs. Giving its reasons, the Committee said this:

> 3.9. It is for these reasons, and the considerable dispute about events that took place, that the Committee reached its decision on orders and concluded that the complex issues surrounding the Complainant's claim for compensation and damages are better dealt with through civil litigation or other mechanisms.

Although that passage does not expressly deal with costs, it appears the Committee accepted the appellants' submission that the Committee should not deal with the costs of the complaints process, leaving it to the High Court to do so.

[51] The Judge began her consideration of this part of Pangani's claim by noting the claim had come in by amendment to the statement of claim at the outset of the trial.[26] Underlying invoices had been provided to the Court but no other narrative or explanation given.[27] Any narration on the invoices had been redacted, leaving only the heading "Disputed sale of Commercial Property — Palmerston North", the time period to which the fees related and (on some of the invoices) a reference to "attached time records". Those records were not placed before the High Court. The Judge then noted:[28]

> (c) no costs order was made by [the Committee], implicitly on the basis that (as the agents had contended) all such matters should be dealt with in the High Court proceedings which had, at that point, been foreshadowed but not filed.

[52] The Judge then said she knew of no case in which a claim for equitable compensation relating to this kind of expenditure had been made.[29] She therefore considered the position in relation to costs as damages in contract and tort claims. She noted the general rule that litigation costs cannot be claimed as damages, the

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26 At [149].
27 At [150].
28 At [151].
29 At [152].

reasons for that rule, and the exceptions to it.[30] She noted the view expressed by Elias CJ in *Z v Dental Complaints Assessment Committee* that disciplinary proceedings such as the one the Committee dealt with were more criminal than civil in nature.[31]

[53] The Judge considered that allowing Pangani its legal costs of the disciplinary process would not offend against either of the two reasons underlying the policy that litigation costs are not recoverable as damages. However, in relation to the first limb the Judge did allow that:[32]

> Permitting a complainant to recover such expenditure in the guise of damages in separate and subsequent proceedings might be said to risk encouraging claimants in future to engage in a far more complicated and costly REAA exercise than is necessary or desirable.

Then the Judge said this:

> [160] And relatedly, there is the point that [the Committee] did not in fact exercise its costs jurisdiction at all in [Pangani's] case. But it did not decline to give [Pangani] costs because it considered that [Pangani] did not deserve them. Rather than making a de minimis award in line with what appears to be its customary practice, it chose to leave the issue for this Court, as the defendants had sought.

[54] This led the Judge to conclude that an award would not undermine the Committee's cost regime and that the costs sought to be recovered were not litigation costs precluded by the rule against costs as damages.[33] Even were she wrong in that view, the Judge considered the claim came within the second exception enunciated by Heath J in *Peters v Peters*.[34] In addition to alleging breach of fiduciary duty, Pangani in the High Court made claims for breach of contract, negligence and breach of the Fair Trading Act 1986. The Judge considered there was:[35]

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30 At [153]–[154]. The Judge explained the policy considerations underlying the rule by citing this passage from Louise Merrett "Costs as Damages" (2009) 125 LQR 468 at 474–475: "First, the rules on the assessment of costs reflect the fact that there are good policy reasons for encouraging parties to exercise restraint which is to the benefit of all those who need to resort to litigation; and secondly, it would undermine the costs rules and, therefore, the policy behind those rules, if the party claiming costs in an assessment could seek to recover any unrecovered costs as damages."

31 *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [50].

32 *Pangani Properties Ltd v Lloyd*, above n 1, at [158].

33 At [161].

34 *Peters v Peters* [2013] NZHC 1061, (2013) 3 NZTR 23-004 at [95].

35 *Pangani Properties Ltd v Lloyd*, above n 1, at [163].

> … a fundamental difference between such a claim made in an occupational regulation context and a claim seeking a remedial exercise of this Court's equitable jurisdiction. …

[55] Finally, the Judge viewed issues of remoteness, mitigation and intervening causes as not being hurdles to awarding Pangani these costs. She cited a number of passages from McLachlin J's judgment in the Canadian Supreme Court in *Canson Enterprises Ltd v Boughton & Co*.[36]

[56] All of this led the Judge to her conclusion:

> [172] In the end, I can, again, do little more adopt a relatively broad brush and robust approach. In my view, an award of $100,000 under this head is warranted. For the avoidance of doubt, I record that this award will preclude any claim for Mr Broom's accounting costs as costs in these proceedings.

[57] We consider it wrong in principle for the High Court to award, as damages or compensation, costs claimed in a different forum having its own costs jurisdiction, in relation to a proceeding brought in that other forum principally for a different purpose. Those costs can and should be dealt with in and by that other forum.

[58] Specifically in relation to Pangani's claim to the High Court for the costs it incurred in making its complaint to the Committee against the appellants, a number of points can be made. First, Pangani did apply to the Committee for a contribution to its legal costs of $97,902.01.

[59] Second, the Committee had jurisdiction to award some or all of those costs. That jurisdiction is in s 93(1)(i) of the REAA which gives the Committee power to:

> … order the licensee to pay the complainant any costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee.

And the Committee can do that on any terms and conditions it thinks fit: s 93(2).

[60] Third, the Committee did not exercise its costs jurisdiction. The Judge accepted that:[37]

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36 *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 at 556.

37 *Pangani Properties Ltd v Lloyd*, above n 1, at [160].

> … there is the point that [the Committee] did not in fact exercise its costs jurisdiction at all in [Pangani's] case. But it did not decline to give [Pangani] costs …

[61] Fourth, although the Judge considered "there is no structured regime or articulated basis governing the making of [costs] orders" by the Committee, she did accept that the Committee has a "costs regime".[38] It is apparent from the judgment that the Judge was not familiar with the way that costs regime operated, although she expressed the view that the REAA "envisions for the parties a relatively straightforward and low-cost process".[39]

[62] Fifth, although Mr Fowler abandoned any "procedural" objections to the manner in which this claim came before the High Court, the process was unsatisfactory. The Judge acknowledged that "no detail has been provided about the services to which the costs relate".[40] Although we were told the appellants objected to this claim, we do not know when and why and with what result. Nor do we know the basis on which the redacted invoices came before the Court. Were they accepted as prima facie evidence? Was there a request to cross-examine the appropriate witness about them? The Judge did not deal with any of these points.

[63] Sixth, there appears to be no impediment to Pangani reverting to the Committee and asking it to make a decision on Pangani's application for costs. The parties now have a costs decision from the Judge which will assist both the Committee and the parties in dealing with Pangani's claim for its legal costs of the disciplinary proceeding.[41] We make this point because, as the Judge noted in relation to the legal costs Pangani sought from the Committee:[42]

> The work done may, as well, have had a beneficial effect on the legal costs incurred in relation to these proceedings.

[64] We set out in [56] above the Judge's award of $100,000. Net of the private investigator costs of $12,210.79 and the accounting expenses of $26,050.39 which are not challenged by the appellants, that award reduces to a round $61,740. For the

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38 At [159] and [161].
39 At [159].
40 At [171]. There are similar observations at [150] and [170].
41 *Pangani Properties Ltd v Lloyd* [2019] NZHC 863.
42 *Pangani Properties Ltd v Lloyd*, above n 1, at [171].

reasons we have given, we set aside that part of the Judge's award, reducing it to $38,260.

Result

[65] The appeal is allowed to the extent that the High Court's award of $100,000 in damages for costs incurred by Pangani in the disciplinary proceeding before the Committee is reduced to $38,260.

[66] The appeal is otherwise dismissed.

[67] The appellants must pay the respondent costs for a standard appeal on a band A basis, but reduced by 25%, and usual disbursements. We certify for second counsel.

Solicitors:
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Wynn Williams , Christchurch for Respondent